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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NICK JIMMY GARDUNO, Defendant and Appellant.	H021924 (Santa Clara County Super.Ct.No. F9883170)

Defendant Nick J. Garduno appeals from the judgment entered after a jury convicted him of several crimes of domestic violence. He claims that the evidence was insufficient to support his conviction of attempted murder and that he was prejudiced at trial by the wrongful admission of expert testimony on battered women's syndrome. We disagree and affirm.

STATEMENT OF PROCEDURE

On March 27, 2000, defendant was charged by amended information with count 1: attempted murder (Pen. Code, §§ 664, subd. (a)/187);[1] count 2: assault with a firearm (§ 245, subd. (a)(2)); counts 3 and 4: inflicting corporal injury on a spouse (§ 273.5, subd. (a)). The information also alleged personal use of a firearm (§ 12022.5, subd. (a)(1)), causing great bodily injury (§ 12022.7, subd. (d)), and personal use of a firearm causing great bodily injury (§ 12022.53, subds. (b), (c) & (d)).

[1] All further statutory references are to the Penal Code unless otherwise stated.

On April 21, 2000, the jury found defendant guilty on all counts and found all allegations to be true.

On June 27, 2000, the trial court sentenced defendant to seven years on count 1 and 25 years to life on the gun use allegation as to count 1. The midterm sentences imposed on counts 2 and 3 were stayed, and a consecutive sentence of one year was imposed on count 4, for a total term of eight years plus 25 years to life.

STATEMENT OF FACTS

Viewed in accordance with the usual rules on appeal (*People v. Osband* (1996) 13 Cal.4th 622, 690), the evidence established: On November 8, 1998, defendant Nick Garduno and his wife Elena Garduno had been married about a month[2] and lived in San Martin in his mother's house with his mother and siblings. About 7:15 a.m., the Santa Clara County Sheriff's Department received a call to respond to a shooting incident at the residence. As Deputy Sheriff Wilson arrived, he encountered Elena Garduno coming out of the house, holding her bleeding side. She asked if the ambulance was there and said her husband had accidentally shot her. She denied knowing where the gun was. After the ambulance arrived and the paramedics attended Elena, Deputy Wilson saw defendant coming out of the house. Defendant was extremely concerned about his wife and stated he had accidentally shot her. When asked about the gun, defendant responded that he had thrown it in the house, but did not know where.

Deputy Cheryl Hill then took charge of defendant outside while other deputies entered the house to search for the gun. Defendant continually asked her if he was going to be in trouble and told her the shooting was an accident. He said he knew he was going to be arrested and put in jail. When Deputy Hill asked about the gun, he eventually told her he would show her where it was. They walked to the back bedroom and defendant told Hill the gun was in the crawl space under the house. He said his wife told him to

[2] They had been together for two years.

throw the gun under the house. Another deputy retrieved the gun, which had the cylinder out and an expended round beside it. Several deputies searched the living room where the shooting had taken place. Two bullet holes were found in the floor and two spent slugs were booked into evidence. Deputy Hill found two live rounds next to the sofa; another was found by another deputy. Hill noticed two gunshot holes in the fireplace wall, but based on statements by the victim and defendant, she did not think those had been made that morning.

Defendant gave several different stories to the deputies. First he said that he threw the gun down onto the pillows on the floor next to the sofa, it went off, and the shot hit his wife. When the deputies expressed disbelief, he changed his story to say that he was lying on his back on the floor playing with the gun. But there were no bullet holes in the wall underneath the window in the direction defendant said he shot. He then said maybe he was lying on his side or his stomach and the round went into the floor. He insisted he only fired one shot, and said the two bullet holes in the fireplace wall had not been made that morning. Defendant told Deputy Sheriff Sechler that there was something wrong with the gun because the hammer would just fall out by itself and that when he was just cocking the hammer, the gun went off.

Meanwhile, Elena was taken to San Jose Medical Center where she was treated for a close-range through and through gunshot wound to her back above her rib cage. She initially told the trauma team that the gun had gone off by accident. She later told Nurse Storey that she was asleep when the gun went off. When Storey noticed a yellow bruise on her forehead, Elena admitted defendant struck her with his fist about a week before.

Elena was interviewed by Deputy Neusel with Sergeant Lemmon in attendance. Sergeant Lemmon took photographs of the victim and observed redness and swelling on her forehead as well as over each of her eyes. Deputy Neusel observed bruising on her face, swelling and redness around both eyes and nose, an older purplish bruise under her left eye. Elena initially told the deputy that all she could remember was that she was

sleeping next to her husband when she heard the gun go off, felt pain in her back, stood up and fell down against the fireplace mantle.[3] Deputy Neusel then asked Elena to repeat her description of what happened because the deputies did not believe her story. Elena looked at Neusel for 15 to 20 seconds, then got teary and started to cry. She said she was unhappy in her marriage, the situation was getting worse because defendant did not have a job and they were together all the time. She said he did not let her go anywhere and did not like her to leave the house. She also said her husband was very controlling and possessive and asked many questions about her former boyfriends. He would become upset and angry when she answered the questions. Elena admitted that defendant had hit her about a week or a week and a half before the shooting. She then described a different version of the shooting, saying they had argued about a former boyfriend. When she turned away on her side to go to sleep, defendant rolled her over and started hitting her face with his right hand. She told him to stop, rolled over with her back to him and then heard a gunshot and felt pain in her back. Elena said she was afraid of her husband and wanted her marriage annulled, but she also said if defendant found out what she had said, she would probably go back to her original story about falling against the mantle. At the end of the interview, the deputies provided her with a domestic violence information card.

Clinical social worker Valerie Williams interviewed Elena the next day. Elena said defendant was drunk and he shot her accidentally during an argument. She also said he had struck her in the face three weeks before. Williams also provided Elena with information on domestic violence resources. Some months later, Elena called Williams and accused her of writing an inaccurate report. She denied saying that defendant shot her.

[3] A nurse had already told Deputy Neusel that she did not believe the victim's story that the bruises on her forehead were caused when she fell against the fireplace mantle.

Deputy Sheriff (now Sergeant) St. Denis spoke with Elena on the morning of the shooting. She claimed not to remember the number of shots and said she did not want to make a police report because she did not want her husband to be prosecuted. She said she told him to hide the gun because she did not want him to get in trouble. She declined the offer of an emergency restraining order. Deputy St. Denis spoke to her again two days later at the house. She claimed not to know how two bullet holes got in the living room floor because defendant shot only once. Several months later, St. Denis encountered Elena outside the courtroom prior to the preliminary hearing. She told him her earlier statements were not true and she was ready to tell the truth. She asked that the interview not be tape-recorded. She then said that the evening before the shooting, she and defendant argued about her past relationships and he hit her on the forehead and left eye. He had also hit her three days earlier. She then described the shooting incident: defendant was lying on the cushions playing with the gun. After he shot at the wall twice, he sat on the couch, placed a small cushion around the cylinder and barrel area and fired another shot into the living room floor toward the window area. As Elena was getting up from the cushions on the floor, she started to roll on her side when she felt a shot in her back. She believed defendant did not intend to hit her although he fired the other three shots intentionally. She did not actually see him fire the shot that hit her.

At trial, Elena testified that the shooting was accidental and that she did not make the statements attributed to her by various witnesses. She admitted that she and defendant sometimes got into yelling arguments, and that he had hit her on the right eye about a week before the shooting. She insisted the incident made her very angry and she went to her parents' house to spend the night. Defendant assured her it would not happen again. Elena further testified that the weekend of the shooting, she and defendant stayed up all night watching television and slept all day, usually on the living room floor on cushions from the sofa. On Saturday evening, they got into an argument over one of her ex-boyfriends and at one point, defendant hit her on the right eye. She was very mad and

was yelling at the top of her lungs.[4] Defendant left the room, but later apologized and then spent time in the garage drinking wine with his cousin. About 6 a.m. on Sunday, she and defendant were lying on the cushions on the floor when she first saw him playing with a gun. She had seen him spin the cylinder on the gun before, but could not remember exactly when. About one-half hour later, defendant said he could hit the trophy on the wall above the fireplace and then fired two shots at it. He was lying on his back on the floor. Elena was angry and told him to stop. Defendant then moved to the couch and continued to play with the gun. Then he got a pillow, put it on his lap and continued to play with the gun. Suddenly a shot went past her right shoulder. She again told him to put it away. Finally she laid back down on the cushions and he got up to put the gun away. As she turned over to get up to go to the bathroom, she heard a shot go off and then felt a burning sensation in her back. She saw defendant struggling, like he did not know the gun would go off. They realized she had been hit and both panicked. Defendant called 9-1-1. She told him to hide the gun because she did not want him to get shot at when the police and ambulance arrived.

Elena denied or did not recall making many of the specific statements testified to by Deputy Neusel, Sergeant St. Denis and the social worker. Specifically she denied telling Deputy Neusel that defendant played with guns, or that she was sitting on her right side and just heard the gun go off, or that only one shot had been fired. She denied many of the statements he reported from the interview. She admitted though that she lied when she told emergency workers that she bruised her face falling against the fireplace mantle, because she did not want to deal with the court system. She thought she had told Sergeant St. Denis about all four shots, but she denied many of the other statements he

[4] Elena said she did not think about calling 9-1-1, but she would leave defendant if he was going to hit her.

reported. She also denied telling the social worker that defendant had hit her before or that the shooting took place during an argument.

At trial the prosecution presented a criminalist with the Santa Clara County crime lab (Edward Peterson) who was qualified as an expert in the field of firearms and wound ballistics. He identified the gun used as a Ruger, Super Blackhawk revolver chambered for the .44 magnum cartridge. He examined the live and spent cartridges recovered and test fired the gun using various cartridges with no misfires. He noted one defect with the gun, concerning a missing cylinder pin latch, but stated this defect could not have caused the gun to misfire accidentally. He explained his reasoning, and in rebuttal described all of his test fires. He also noted that the design defect found in this gun would only affect the firing if the gun was dropped sharply or the hammer forcefully banged to cause a misfire.

The defense expert Jess Guy, qualified as an expert on the Ruger revolver, had explained the gun had a design defect, but ultimately agreed that it would not accidentally go off when the hammer was cocked.

Both sides introduced testimony from experts in the field of domestic abuse and battered women's syndrome. Dr. Richard Ferry testified for the prosecution. He described the process of domestic violence and the behaviors and psychological process which occur in battered women's syndrome. He noted that the legal process required a woman to suffer at least two beatings for a pattern of abuse to be shown such that she was considered a battered woman, but he personally believed from his experience that even one battering could cause the battered women's syndrome. Dr. Jules Burstein testified for the defense. He explained that for a woman to be suffering from battered women's syndrome, the battering relationship must have existed over a lengthy period of time and that one or two incidents of domestic violence could not create the syndrome.

The defense also included an expert on alcohol and alcohol ingestion who noted defendant's blood alcohol level at 9:48 a.m. after the shooting was .07 percent by weight,

and opined that his blood alcohol level at the time of the shooting might have been as much as .12 percent by weight. The expert testified this blood alcohol level impaired fine motor skills, as well as perception and thinking, and could increase risk-taking behavior.

DISCUSSION

I

Sufficiency of the Evidence

Defendant first contends that the evidence is insufficient to support his conviction of attempted murder, in that there was no evidence of his specific intent to kill his wife.

Standard of Review

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The reviewing court views the evidence in the light most favorable to the prosecution and presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Osband, supra,* 13 Cal.4th at p. 690.) "Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11.)

Moreover, "[t]he standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the

jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11, quoting *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) This concept was further explained in *People v. Akins* (1997) 56 Cal.App.4th 331, 336: "Defendant bears a massive burden in claiming insufficient evidence to sustain his convictions because our role on appeal is a limited one. Our standard of review is to 'examine the entire record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citations.] Furthermore, if the verdict is supported by substantial evidence, we are bound to give due deference to the jury and not retry the case ourselves. [Citation.] [¶] Defendant's hurdle to secure a reversal is just as high even when the prosecution's case depends on circumstantial evidence. The 'sufficiency of the evidence' standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citations.]"

Sufficiency of Evidence

"In order to prove a defendant committed an attempted murder, there must be sufficient evidence of the intent to commit the murder plus a direct but ineffectual act towards its commission. [Citation.]" (*People v. Morales* (1992) 5 Cal.App.4th 917, 925.) "Although malice may be express or implied with respect to a charge of murder, implied malice is an insufficient basis upon which to sustain a charge of attempted murder because specific intent is a requisite element of such a charge. [Citation.] Thus, to sustain a charge of attempted murder, the evidence must demonstrate a deliberate intention unlawfully to kill a fellow human being. (Cf. . . . § 188.)" (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Such evidence is usually circumstantial. "There is rarely direct evidence of a defendant's intent. Such intent must usually be

derived from all the circumstances of the attempt, including the defendant's actions. [Citation.]" (*Ibid.*)

The evidence showed that the victim was shot at close range and received a through and through gunshot wound to her back above her rib cage. The evidence, viewed most favorably to the verdict, also showed defendant had fired another shot that went past her shoulder as she lay on the floor. The victim admitted to one police officer that defendant had fired the first three shots intentionally, including the shot that hit the floor immediately before she was hit. Both weapons experts agreed that whatever defect the gun had would not have allowed it to misfire simply by cocking the hammer. Defendant had hit the victim at least once or twice during the argument before the shooting, according to the victim, and she had admitted he hit her on one or more previous occasions. To certain witnesses, the victim described defendant as possessive, controlling and jealous of her former boyfriend. These facts reasonably justify the jury's findings and we will not disturb that verdict on appeal. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

Although defendant conceded that he had hit the victim and admitted the shooting, he insists the shooting was an accident caused by a defective gun. He emphasizes the various statements made to the police officers by both the victim and himself that the shooting was an accident. He explains that her hesitance to talk to the authorities and her inconsistent statements arose because she did not want her privacy invaded. His inconsistent statements, he claims, were similarly based in his reluctance to admit he had been reckless with the gun. He points out that the prosecution introduced no evidence of threats or actual motive, that no other family members were called as witnesses, and that no testimony on physical evidence, such as blood spatterings or gunshot residue, was offered. Defendant maintains that at most the evidence proved an assault with a deadly weapon. However, these arguments are essentially an invitation to reweigh the evidence,

a task not within our function as a reviewing court. (See *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1027.)

Moreover, defendant's numerous untrue statements to police officers and his various versions of the incident could cause the jury to see him as less than truthful and thus discount his statements that the shooting was an accident. Defendant also argues that the fact that he struck his wife could not be used to show intent to kill. But that fact could have been used by the jury as evidence of defendant's ongoing use of physical force against his wife when he was angry.

The People rely on the case of *People v. Chinchilla, supra,* in its discussion of the indirect evidence of a defendant's intent in an attempted murder case. The *Chinchilla* court stated: "The act of firing toward a victim at a close, but not point blank, range in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill.' [Citation.]" (52 Cal.App.4th at p. 690.) Defendant asserts the specific facts of *Chinchilla* make it inapplicable here. In that case, the defendant shot at a police officer, but was convicted of two attempted murders because a second police officer was crouched behind the first. The defendant had been firing on other officers after being ordered to put down his gun, and the reviewing court concluded sufficient evidence existed to support both convictions. The court in *Chinchilla* relied on the case of *People v. Lashley* (1991) 1 Cal.App.4th 938. In that case, the reviewing court found sufficient evidence for the conviction of attempted murder even though the defendant testified that he only shot toward his victim to scare or wound him. (*Id*. at p. 945-946.) "One who intentionally attempts to kill another does not often declare his state of mind before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that issue, our sole function is to

determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.] . . . Our role is to determine the legal sufficiency of the found facts and not to second guess the reasoning or wisdom of the fact finder." (*Id*. at pp. 945-946, original italics.) Here, we find sufficient evidence to uphold the finding of the trier of fact.

II

Expert Witness Testimony

Defendant also contends the trial court prejudicially erred when it admitted evidence of battered women's syndrome because such evidence was irrelevant to the victim's credibility and violated his rights to equal protection and due process.

Procedural Background

Prior to trial, defendant objected to the admission of expert testimony on the issue of battered women's syndrome on the ground that there was no pattern of abuse between defendant and his wife and no study in support of the prosecutor's theory of one episode of battering being sufficient to create the syndrome in the victim. The court initially stated that it could not legally preclude an expert from testifying and that it would allow the expert to testify, but that defendant could renew his motion during trial.

Defendant renewed his motion after the victim had testified and before the prosecution's expert witness was called. The trial court noted that it had waited to rule on the issue until after the victim and other prosecution witnesses to whom the victim had given statements had testified. The court stated that it found sufficient evidence in the record to support the admission of the expert testimony. The court pointed to the victim's demeanor, her testimony and her contradictions. The next day the court further explained its ruling on the record and discussed the *Gomez* case (*People v. Gomez* (1999) 72 Cal.App.4th 405), in finding that victim credibility was a key issue, the testimony

supported a finding that the victim was a battered woman, and under Evidence Code section 352, the expert's testimony would be more probative than prejudicial.[5]

Two expert witnesses were qualified and then testified: Dr. Richard Ferry for the prosecution and Dr. Jules Burstein for the defense. Dr. Ferry, a licensed marriage and family therapist, testified that he specialized in domestic violence issues. He described battered women's syndrome as a collection of symptoms that occur in a woman in response to being battered in an intimate relationship. Two defense mechanisms relied on by such women are denial that the event occurred, a distortion of reality, and minimization, an acknowledgement of some aspects of the event, but a reduction of the subjective impact. Dr. Ferry described these as unconscious processes that arise reflexively, thus the person involved does not believe she is lying. Dr. Ferry also testified that in the legal process, a woman must experience at least two beatings for a pattern of abuse to be shown such that a woman can be termed a battered woman. However, in his opinion, based on his clinical experience treating victims of domestic violence, a woman who has experienced even one battering may have the behavior of a battered woman and thus fit within the characteristics of the battered women's syndrome. He admitted that there are no documented studies to support his opinion. Dr. Ferry also described the process of recanting, whereby the victim reconnects emotionally to her abuser after her feeling of autonomy or separation has eroded. He explained why a victim of a battery or

[5] "And I really wanted to clean up my ruling that I made last night concerning the expert on the battered women's syndrome. [¶] And I think we all know that victim credibility is one of the key issues in this case. And I was able to observe not only her demeanor while she was testifying but also the other witnesses in the case whose testimony does bear on the witness's credibility. [¶] And quoting from *Gomez*, . . . page 415, they say in there that the court must first decide whether the testimony in the particular case supports a contention that the petitioner was a battered woman and they . . . cite [*Fennell v. Goolsby* (E.D. Pa. 1985) 630 F.Supp. 451, 459]. [¶] Additionally, they talk about the prejudice outweighing the probative value and I want to make a finding here that I think under 352, it is more probative than prejudicial allowing the expert, so that's my ruling."

gunshot would make a statement incriminating her partner and then later recant it: either the first statement was accurate and made when she was aware of the danger she was in and the need to do something to help herself, but she later sank back into the relationship and covered up. Or, the first incriminating statement could have been a fabrication due to vindictiveness and she later made true exculpatory statements. Ferry noted it was up to the prosecution and the defense to convince the jury which was the true statement in a particular case.

Jules Burstein, Ph.D. was a licensed psychologist who was qualified as an expert in the area of domestic abuse and battered women's syndrome. He testified that when there were only two incidents of domestic violence, the victim could not be suffering from battered women's syndrome because the impairment must persist over time before it can be termed a syndrome. He also explained recantation as a characteristic of battered women's syndrome which occurs over time. Dr. Burstein opined that a scenario such as one where the woman initially told law enforcement authorities that her spouse accidentally shot her and she fell down and then changed her story to say that her spouse hit her and then shot her would not be considered recantation, and would be inconsistent with battered women's syndrome.

Discussion

In admitting expert testimony, the trial court has wide discretion to determine relevance (*People v. Garceau* (1993) 6 Cal.4th 140, 177), and its ruling will be not be disturbed unless there is a manifest abuse of that discretion. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1303.)

Evidence Code section 1107 provides: "(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which

form the basis of the criminal charge. [¶] (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness . . . ." The court in *People v. Gomez, supra,* 72 Cal.App.4th at pp. 415-416, explained the trial court's role as applied to this expert testimony: "Whether expert testimony regarding battered women's syndrome is admissible in a particular case initially depends on whether that evidence is relevant. 'In making a determination of *relevancy*, the court must first decide whether the evidence in the particular case supports a contention that the petitioner was a battered woman. Expert testimony on battered [women's] syndrome is *irrelevant* unless there is a sufficient factual basis for the fact that petitioner was a battered woman.' (*Fennell v. Goolsby*[, *supra*,] 630 F. Supp. [at p.] 459.)" (Original italics.)

Here, defendant insists there was no evidence the victim was a battered woman because there were no prior incidents of violence against her and one incident is not enough to establish the battered women's syndrome. He relies on the statement in *Gomez*: "A single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from battered women's syndrome." (*People v. Gomez, supra,* 72 Cal.App.4th at p. 417.)

However, the information itself charged (and the jury convicted of) the infliction of corporal injury on a spouse (hit to the right eye) about a week before the shooting incident, which itself included a hit to the right eye earlier in the evening. Both of these batteries were admitted to by the victim in her trial testimony. But defendant claims this shows only one brief period of violence, not long enough to trigger the syndrome. We hesitate to say as a matter of law that the two batterings coupled with a serious gunshot wound could be called a brief period of violence that does not qualify as more than a single violent incident as required by *Gomez*.

In addition, the People in their brief have detailed numerous other incidents reported by the victim to other witnesses. To Deputy Neusel she reported that defendant

hit her one and one-half weeks before the shooting resulting in the purple bruise on her left eye and that defendant punched her in the face with his fist a few minutes before she heard the gun go off. In her statements to Sergeant St. Denis, she variously said that defendant hit her on the forehead and left eye about 10:00 p.m. on the night before the shooting and that he hit her about three days before the shooting. In her conversation with social worker Valerie Williams, the victim said defendant hit her approximately three weeks before the shooting. Then at trial, the victim testified that defendant hit her on the right eye about one week before the shooting and that he hit her on the right eye again on the evening before the shooting. She also denied some of the statements she had made to the other witnesses.

In listening to all this testimony and observing the demeanor of the victim as she testified, the trial court concluded there was enough evidence to establish the requisite pattern of abuse specified in *Gomez*. (See also *People v. Gadlin* (2000) 78 Cal.App.4th 587 [For expert testimony to be admissible, there must be sufficient evidence to support a contention that the syndrome applies to the woman involved, and there must be a contested issue as to which that testimony is probative; couple involved went through battering cycle twice over extended period of time].) The trial court also concluded the victim's credibility was not only at issue, but was a key issue in the case, and thus the expert testimony on battered women's syndrome could help the jury understand conflicting testimony and evaluate the victim's credibility. We find no abuse of discretion.

Moreover, the court in *People v. Williams* (2000) 78 Cal.App.4th 1118, reasoned that even one episode of domestic violence could trigger a need for expert testimony: "[t]here is nothing in Evidence Code section 1107 to suggest that the Legislature intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator." (*Id.* at p. 1129.) In fact,

the statute itself allows the admission of expert testimony regarding battered women's syndrome to explain the behavior and perceptions of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the crime at issue, and after a foundation of relevancy is established. We find *Williams* a better reasoned view.

The function of the jury is to assess the credibility of the witnesses and thus to arrive at the truth of what actually occurred and to determine whether in fact a crime was committed. The circumstances surrounding crimes of domestic violence and the victim's attitude may not fit the normal pattern where the victim of a crime identifies the perpetrator and says, in effect, "That person did it and should be punished." Both experts here testified that domestic violence often creates or fosters certain attitudes and behaviors in the victim that do not accord with the normal response to a crime against the person. Thus expert testimony can be helpful to the trier of fact to help in understanding why a victim may testify reluctantly or change stories or deny earlier statements.

The Supreme Court in the case of *People v. Humphrey* (1996) 13 Cal.4th 1073 initially set forth the standard for a pattern of abuse, as used in the *Gomez* case and as asserted by defendant here. But that case differed substantively, in that it concerned the use of expert testimony on battered women's syndrome by the defense where a female defendant who shot and killed her husband, alleged that because she was a battered woman, she actually killed in long-term self-defense and thus was not guilty of murder. As noted by the court in *People v. Williams, supra,* 78 Cal.App.4th at p. 1130: "The Supreme Court concluded that the evidence was appropriate to aid the jury 'in deciding the reasonableness as well as the existence of defendant's belief that killing was necessary.' [Citation.] In that light, it is reasonable to require that the alleged victim/defendant establish a history of abuse. That is qualitatively different than the purpose for which the evidence was admitted in this case." The *Williams* court thus

decided that the *Humphrey* requirement should not apply when the victim of domestic violence is not the defendant.

Defendant insists that the facts of *Gomez* are so similar to the case at hand that we are bound to reverse for improper admission of expert testimony. There, the victim and her boyfriend argued and she said she cut her hand while trying to take a knife away from him. She portrayed herself as the aggressor. To a police officer, she allegedly admitted the defendant was actually threatening her with the knife at her neck. The trial court admitted testimony by a domestic violence expert, who testified extensively on all aspects of domestic violence and battered women. The Court of Appeal found this evidence wrongly admitted and prejudicial when there had been only this single incident of possible domestic violence.

The case at hand differs significantly in several aspects. First, as noted above, at trial the victim admitted at least two batterings prior to the shooting. Moreover, to other witnesses, she described several additional incidents and sported bruises of various ages.

Defendant further claims that his right to equal protection of the law is violated if the standard for admission of expert testimony differs for him as a defendant as opposed to the female victim/defendant in the case of *People v. Humphrey*, *supra*, 13 Cal.4th 1073. He insists that the prosecution must prove the batterings happened over an extended period of time and that the presence of the syndrome in the victim is the result of abuse, whereas here, neither he nor the victim fit the supposed profile of batterer and victim. However, he ignores the fact that the trial court here, after hearing much testimony, determined that a sufficient showing was made that the victim was a battered woman. Moreover, we agree with the People, that the battered woman as a defendant asserting a need for self-defense and the battered woman as a victim denying or minimizing the crime are not similarly situated such that an equal protection claim has merit. (See *People v. Massie* (1998) 19 Cal.4th 550, 571 [the first prerequisite to any

equal protection claim is a showing that the state has adopted a classification that affects similarly situated groups in an unequal manner].)

Similarly, we find no merit to defendant's claim that his right to due process of the law is violated. The trial court first determined the victim's credibility was at issue, because of her contradictory statements on various details of the shooting incident itself as well as her contradictory statements about past abuse. Neither expert witness discussed this particular husband and wife nor offered an opinion on specific facts or the actual occurrence of a crime. (See *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1217.)

Finally, defendant asserts the erroneous admission of the expert testimony was not harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18) and it was reasonably probable that a different result would have occurred without the error (*People v. Watson* (1956) 46 Cal.2d 818, 836). He also claims the erroneous admission of prejudicial evidence rendered his trial unfair. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

But we have concluded the admission of the testimony was not in error. The trial court heard the victim's testimony and the testimony of the other witnesses before determining that sufficient evidence existed to show the victim could be considered a battered woman. Furthermore, numerous jury instructions cautioned the jury about the correct use of the expert testimony, its right to ignore opinions it found unreasonable, and that the expert's testimony on a hypothetical is not necessarily true. (CALJIC Nos. 2.09, 2.80, 2.82.) The jury was also instructed with CALJIC No. 9.35.1, that when evidence is admitted pursuant to Evidence Code section 1107, it could not be considered to prove the occurrence of the act or acts of abuse which form the basis of the crime, rather it could only be considered for the limited purpose of showing that the victim's reaction was not inconsistent with the typical behavior of victims of domestic violence.

We also find it important to note that defendant presented his own expert witness who disagreed with some of the opinions of the prosecution expert. In fact, the defense

expert opined that a pattern of abuse over a lengthy period of time was necessary to create battered women's syndrome in a victim of domestic violence. Thus, the jury had the benefit of two different views on battered women's syndrome and could assess the value of each expert view in evaluating the victim's testimony and credibility.

DISPOSITION

The judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.